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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

TOWNSHIP OF PISCATAWAY, TOWNSHIP OF WOODBRIDGE, BOROUGH OF NORTH ARLINGTON, BOROUGH OF PARAMUS, and BOROUGH OF WOODCLIFF LAKE,

Petitioners,

v.

NEW JERSEY CITIZEN ACTION, LEAGUE OF CONSERVATION VOTERS, PARAMUS CITIZENS FOR A NUCLEAR WEAPONS FREEZE, PENNSYLVANIA PUBLIC INTEREST COALITION, REPUBLICAN CITY COMMITTEE OF PHILADELPHIA, AMERICANS FOR DEMOCRATIC ACTION OF SOUTHEASTERN PA., and FRIENDS OF BOB EDGAR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for
the Third Circuit

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QUESTIONS PRESENTED FOR REVIEW

1) Whether the proper standard for the review of ordinances regulating the hours when door-to-door solicitation is permitted is the "ample alternative channels of communication" test or the "least restrictive means of accomplishing the municipal purpose" test.

2) Whether lower courts may deviate from this Court's finding of "constitutional facts" in Martin v. City of Struthers, 319 U.S. 141 (1943), regarding door-to-door solicitation.

3) Whether the Court below erred in holding that municipal ordinances requiring door-to-door solicitors to be fingerprinted for identification purposes and to detect and deter crime, as a condition of licensure, violates constitutional requirements.

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Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals

for the Third Circuit filed on August 5, 1986 (Rehearing and Rehearing In Banc having been denied on September 25, 1986), which reversed a judgment by the United States District Court for the District of New Jersey.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 797 F.2d 1250 (3rd Cir. 1986). The Opinion and Order of the United States District Court for the District of New Jersey is unreported. Copies of both these opinions, as well as the Order denying Rehearing and Rehearing In Banc, are reproduced in the Appendix hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

Piscataway, N.J., Revised General Ordinances, Chapter VII (1982)

North Arlington, N.J., An Ordinance to Regulate Canvassing Within The Borough Of North Arlington, County of Bergen and State of New Jersey, And Providing Penalties For The Violation Thereof (May 2, 1950)

Paramus, N.J., Revised Ordinances, no. 80-7, chap. 21, sec. 11 (1980)

Woodbridge, N.J , Revised Ordinances, art. 7 (1964)

Woodcliff Lake. N.J., Code §76-8 (1976)

(A complete text of these ordinances is reproduced in the Appendix hereto).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners Township of Piscataway, Township of Woodbridge, Borough of Paramus, Borough of North Arlington, and Borough of Woodcliff Lake are municipal corporations and public entities of New Jersey; each Petitioner has enacted an ordinance regulating door-to-door solicitation within its borders.

Respondents New Jersey Citizens Action ("NJCA") and League of Conservation Voters ("League") are not-for-profit organizations whose paid employees engage in door-to-door solicitation in order to disseminate information addressing environmental and other public issues.

Respondent Paramus Citizens for a Nuclear Weapons Freeze ("CNWF") is an informal association which opposes nuclear weapons escalation; its activities, limited to the

Borough of Paramus, are carried out by unpaid volunteers.

Intervenors in the Third Circuit, Pennsylvania Public Interest Coalition, Republican City Committee of Philadelphia, Americans for Democratic Action of Southeastern Pennsylvania, and Friends of Bob Edgar, are electoral and political advocacy groups engaging in various door-to-door solicitation endeavors.

As shown at trial, NJCA and the League raise the bulk of their operating funds through door-to-door soliciting. Revenues are derived by soliciting donations and through the door-to-door sale of magazine subscriptions, literature, and related documentary materials.

Respondents evaluate prospective solicitors on their mastery of salesmanship, but neither verify background information provided by prospective employees nor confirm references. Respondents view the criminal background of a prospective solicitor as irrelevant to his or her utility as a salesperson and a fund-raiser.

Respondents contend that their First Amendment rights have been infringed by Petitioners' ordinances, principally in two ways. First, each municipality limits the hours during which door-to-door solicitation may be conducted (until sunset in Piscataway; until 5:00 p.m. in North Arlington, Woodbridge and Woodcliff Lake; and until 6:00 p.m. in Paramus) [and during December in North Arlington].

Respondents contend that canvassing during day-time hours produces insufficient revenues for salaries and adminstrative expenses, because fewer working people are home before dark and revenues consequently suffer. Petitioners contend that the time restrictions deter the commission of crimes, such as burglaries, which characteristically occur at night. The time limits seek to protect the privacy of residents and to maximize their security after dark.

Second, the ordinances of North Arlington, Woodbridge, Paramus and Piscataway require that each individual solicitor be fingerprinted. Although Respondents have no objection to providing names, addresses, telephone numbers, and driver's license

information for each solicitor, they object to fingerprinting on several grounds, including, among others, a perceived air of criminality, and the subjective pre-supposition of criminal activity on the solicitor's part which makes it more difficult to recruit solicitors.

Petitioners contend that fingerprinting is the most accurate method of identification; that fingerprinting, unlike other forms of identification, permits cross-checking with extra-municipal law enforcement agencies to confirm identities; and that fingerprinting is the only method from which the past criminal background of any person can be derived.

Indeed, the very existence of a fingerprinting requirement acts as a crime

deterrent, because fingerprinting is the only positive method of identifying the individual and determining whether that individual has a criminal record.

EDITOR'S NOTE

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REASONS FOR GRANTING WRIT

I. CERTIORARI SHOULD BE GRANTED TO REVIEW A CONFLICT BETWEEN CIRCUIT COURTS OF APPEAL ADDRESSING THE PROPER STANDARDS FOR LOCAL REGULATION OF HOURS WHEN DOOR-TO-DOOR SOLICITATION IS PERMITTED, AND TO REVIEW THE EXTENT TO WHICH LOWER COURTS ARE BOUND BY THIS COURT'S ESTABLISHMENT OF "CONSTITUTIONAL FACTS" AS TO DOOR-TO-DOOR SOLICITATION.

In Martin v. City of Struthers, 319 U.S. 141 (1943), this Court stated:

> Burglars frequently pose as canvassers, either in order that they may have a pretense to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. 319 U.S. at 144.

at statement remains as valid today, both actically and legally, as when it was written rty three years ago.

To protect residents from burglaries and other crimes, as well as from annoyances associated with nighttime solicitation, many municipalities have adopted ordinances regulating the time, place and manner of such activity. This Court has approved the constitutionality of such ordinances in general, conceptual terms, Cantwell v. Connecticut, 310 U.S. 296 (1940); Schneider v. State, 308 U.S. 147 (1939), affirming the "valid and important interests" served by such ordinances, including the protection of "citizens from crime and undue annoyance..." Hynes v. Borough of Oradell, 425 U.S. 601, 611 (1976). The Court has never, however, specifically addressed the proper legal standard for reviewing ordinances regulating the hours within which solicitation is permitted. City of Watseka v. Illinois Public Action Coun-

cil, 796 F.2d 1547, 1551 (7th Cir. 1986); see Note, Strangers in the Night: Ordinances Restricting the Hours of Door-to-Door Solicitation, 63 Wash. U.L.Q. 71, 72 (1985).

To test the validity of municipal regulation of the time, place and manner of communicative endeavors (such as door-to-door solicitations), this Court has established a three part test. Restrictions will be upheld if they are implemented, "without reference to the content of the regulated speech, ... serve a significant governmental interest, and. . . leave open ample alternative channels for communication. . ." Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976); see also Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 648

(1981). Nevertheless, within these parameters, the Circuit Courts of Appeal differ as to the proper standard of review regarding ordinances specifically addressing door-to-door solicitation: The Second, Seventh and Eighth Circuits hold that a regulation limiting the time for door-to-door solicitation must be the "least restrictive means of accomplishing the municipal purpose", while the Third Circuit follows the "ample alternative channels of communication" formulation. See New York City Unemployed and Welfare Council v. Brezenoff, 677 F.2d 232, 237-39 (2nd Cir. 1982); Pennsylvania Alliance For Jobs and Energy v. Council of the Borough of Munhall, 743 F.2d 182 (3rd Cir. 1984) ("PAJE"); City of Watseka v. Illinois Public Action Council, 796 F.2d at 1554; Wisconsin Action

Coalition v. City of Kenosha, 767 F.2d 1248, 1257 (7th Cir. 1985); Association of Community Organizations for Reform Now v. City of Frontenac, 414 F.2d 813, 818-819 (8th Cir. 1983). These clearly different standards constitute a conflict in a signal area of federal law.

Although a particular Circuit Court of Appeals might well find that an ordinance satisfies the first two parts of the Virginia Pharmacy Board/ Heffron test, consideration of the third component expessed as either the "ample alternative" or "least restrictive" formula, will, in the final analysis, determine the validity of the ordinance; therefore, an ordinance will be evaluated based upon the situs of the suit, and profoundly differing

results will be produced because of geographic happenstance. This Court's review and direction is respectfully solicited to clarify the extent to which local governments may seek to protect the privacy interest of residents and their concerns for the security of their persons and property in their homes, consistent with all constitutional guarantees.

Similarly significant in federal jurisprudence is the extent to which litigants may rely upon "constitutional facts" without the need to re-prove commonly accepted factually underpinnings. For example, this Court in Martin v. City of Struthers, supra, found as a "constitutional fact" some relationship between door-to-door canvassing and criminal activity. 319 U.S. at 144. Since 1943, this relationship has been accorded precedential

weight. PAJE, supra at 187; but see the majority opinion in New Jersey Citizen Action v. Edison Township, 797 F.2d 1250, 1260 (3rd Cir. 1986).

Municipalities commonly rely upon such constitutional facts to predict the validity of their regulatory actions. In Renton v. Playtime Theatres Inc., ____ U.S. ____, 106 S.Ct. 925, 89 L.Ed. 2d (1986), for example, this Court reaffirmed the importance of this practice:

> We hold that Renton was entitled to rely on the experiences of Seattle and other cities...in enacting its adult theatre zoning ordinance. The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or to produce evidence independent of that already generated by other cities, so long as

> whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. 89 L.Ed.2d at 40.

Disregarding this well-reasoned and practical approach, the majority opinion below emphatically rejects the right of local government to rely upon generalized experience to show social ills; that opinion suggests that the City of Renton should have permitted adult theatres to flourish and establish a clear local history of anti-social activity before local regulation of such theatres is appropriate. Following that logic, unless a municipality can show that solicitors cause crime in that particular municipality, the local unit may not regulate solicitors, despite contrary experience elsewhere; the majority below views the concept of "consti-

tutional facts" as having only limited viability, if that.

The need for litigants to rely upon pronouncements of this Court cannot seriously be questioned. If litigant municipalities cannot rely upon constitutional facts accepted by this Court as true for decades, they will be compelled "to make fundamental policy decisions on an ad hoc basis [,]" New Jersey Citizens Action v. Edison Township, supra, 797 F.2d at 1269 (Weis, J., dissenting). The dissent below properly recognizes that constitutional facts "must necessarily carry precedential weight so that governments will be able to predict the validity of their regulatory actions." New Jersey Citizens Action v. Edison Township, supra, 797 F.2d. at 1268 (Weis, J., dissenting).

The extent to which local governments and other litigants may rely upon constitutional facts is clearly an important and unresolved question of federal law which requires this Court to grant certiorari in this matter.

II. THIS COURT SHOULD GRANT CERTIORARI TO ADDRESS THE ISSUE OF FINGERPRINTING OF DOOR-TO-DOOR SOLICITORS AS A CONDITION OF MUNICIPAL LICENSURE, WHERE FIRST AMENDMENT ASPECTS OF FINGERPRINTING HAVE NEVER BEFORE BEEN ADDRESSED OR DECIDED BY THIS COURT AND WHERE ALL PARTIES CONCEDE THAT FINGERPRINTING IS THE ONLY SURE METHOD OF IDENTIFICATION.

In Martin v. City of Struthers, supra, this Court held that a municipality "can by identification devices" regulate canvassers in order to deter criminal conduct. 319 U.S. at 148. In so holding, the Court relied upon its earlier decision, Cantwell v. Connecticut:

> Without doubt a state may protect its citizens from fraudulent solicitation by requiring a stanger in the community, before permitting him publicly to solicit funds for any purpose, to

> establish his identity and his authority to act for the cause which he purports to represent. 310 U.S. at 306 (emphasis added)

This position has been emphasized by the Court more recently in Village of Schaumburg v. Citizens For a Better Environment, 444 U.S. 620, 632, (1980), and Hynes v. Borough of Oradell, 425 U.S. at 618-619, where then Associate Justice Rehnquist wrote in dissent:

> The Court recognizes that none of our cases have ever suggested that a regulation requiring only identification of canvassers or solicitors would violate any constitutional limitation. 425 U.S. 631.

This Court has never before specifically addressed the propriety vis-a-vis the First Amendment of fingerprinting as a means of identification. Those lower federal courts which have considered this issue, however, have universally rejected the positions

espoused by the respondents and now adopted by the Third Circuit below.

In United States v. Kelly, 55 F.2d 67 (2nd Cir. 1932), Judge Augustus Hand, while recognizing the importance of fingerprinting "to identify criminals and detect crime", wrote that fingerprinting "is no more humiliating than other means of identification that have been universally held to infringe neither constitutional nor common law rights. Fingerprinting is used in numerous branches of business and of civil service, and is not itself a badge of crime." 55 F.2d at 70. See also Thom v. New York Stock Exchange, 306 F. Supp. 1002, aff'd sub. nom., Miller v. New York Stock Exchange, 425 F.2d. 1074 (2nd Cir.

1970), cert. denied, 398 U.S. 905 (1970)*; Iacobucci v. City of Newport, Ky., 785 F.2d. 1354 (6th Cir. 1986).

The purpose of the municipal fingerprinting requirement here is the positive identification of prospective solicitors and the determination of any criminal background, which has a direct impact on the safety and security of municipal residents. Clearly, fingerprinting is the only positive and sure method of identifying a person and determining whether he possesses a criminal record. Thom v. New York Stock Exchange, 306 F. Supp. at 1006 ("Fingerprinting has long been recognized

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* Footnote 17 of the District Court opinion in Thom lists other federal and state court decisions which have rejected the contention that fingerprinting is stigmatizing or implies criminality. 306 F. Supp. at 107-108.

as a scientific and accurate means of identification."). While not binding on this Court, New Jersey courts have reached the same conclusion. Moyant v. Paramus, 30 N.J. 528, 154 A.2d 9 (Sup. Ct. 1959); Roesch v. Ferber, 48 N.J. Super. 231, 239, 137 A.2d 61, 66 (App. Div. 1957) ("It can be judicially noticed that there is, as yet, no other means of identification which affords the same assurance of correctness that fingerprinting does.")

The fingerprinting requirement is rationally related to, and serves the vital interest of, detecting and deterring crime. Under these circumstances, this Court should grant certiorari to determine whether the Constitution permits the use of fingerprinting as a legitimate identification device in the context of solicitation.

The grant of certiorari is particularly significant, because, as recognized by the majority opinion below, no federal or state court appears to have addressed the relationship between the First Amendment and local government fingerprinting for purposes of the identification of solicitors, New Jersey Citizens Action v. Edison Township, supra, 797 F.2d. at 1262; clearly, four of the petitioners here have concluded independently that fingerprinting is a legitimate tool for such purposes, based upon, in part, the emphasis which this Court has placed on the legitimacy of identification devices, see Martin v. Struthers and Cantwell v. Connecticut, both supra. Presumably, other localities have reached the same conclusion; the impact

of the issue with respect to public safety generally, therefore, is far-reaching and deserving of this Court's full consideration.

CONCLUSION

For the foregoing reasons, this writ should be granted and the judgment of the Court of Appeals for the Third Circuit reversed.

Respectfully submitted,

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